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**EXTRADITION BETWEEN HONG KONG AND MAINLAND CHINA:  
A COMMENT ON THE 2019 AMENDMENT TO THE HONG KONG FUGITIVE OFFENDERS  
ORDINANCE IN COMPARISON WITH THE EUROPEAN ARREST WARRANT**

Yanhong Yin, Irene Wieczorek\*

## INTRODUCTION

In early 2018, 19-year-old Hong Kong resident Chan Tong-kai killed his pregnant girlfriend Poon Hiu-wing in Taiwan, then returned to Hong Kong. Chan admitted the murder to the Hong Kong police. However, when Taiwanese authorities requested his surrender, the police were unable to comply with it because there is no legal basis for surrender of fugitives between Hong Kong and Taiwan.<sup>1</sup> Hong Kong domestic law on extradition, the Fugitive Offenders Ordinance,<sup>2</sup> provides the baseline for extradition arrangements the Hong Kong government would want to conclude with third parties. It specifies that it refers to arrangements between the Government of Hong Kong and the government of a place outside Hong Kong *other than* the Central People's Government or the government of any other part of the People's Republic of China (PRC).<sup>3</sup> This excluded therefore any extradition to Taiwan, but also Mainland China and Macao.<sup>4</sup>

Spurred by the legal difficulties that this case clearly shown, in February 2019, the Hong Kong government proposed an amendment to the existing Fugitive Offenders Ordinance (hereinafter the FOO Amendment) so to allow in specific circumstances also the conclusion of *special* surrender<sup>5</sup> arrangements also to other parts of the PRC. The proposed text was updated in May 2019.<sup>6</sup> Yet after

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<sup>1</sup> 'Taiwan won't ask for murder suspect if Hong Kong passes "politically motivated" extradition law' Hong Kong FreePress (10 May 2019) <<https://staging.hongkongfp.com/2019/05/10/taiwan-wont-ask-murder-suspect-hong-kong-passes-politically-motivated-extradition-law/>> Accessed 15 April 2020.

<sup>2</sup> Fugitive Offenders Ordinance chapter 503, available at: <https://www.legislation.gov.hk/hk/cap503> Accessed 24 February 2020, (hereafter FOO).

<sup>3</sup> Part I, Section 2(1) a of FOO, n 2.

<sup>4</sup> On the administrative divisions of the PRC and the position of Taiwan see briefly the next section, and more broadly J Liang, Party Autonomy in Contractual Choice of Law in China (CUP 2018), 219-229.

<sup>5</sup> The article uses the terms extradition and surrender interchangeably.

<sup>6</sup> Government of Hong Kong 'Statement Given by Secretary of HK Security Bureau on the Amendment of Hong Kong Fugitive Offender Ordinance' (30 May 2019) <<https://www.info.gov.hk/gia/general/201905/30/P2019053000811.htm>> Accessed 24th February 2020 (hereafter Statement by Secretary of HK Security Bureau). The text of the amendment is available at: <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>. Accessed on the 15 July 2020.

4 months' protests, the proposed amendment was finally withdrawn by the Hong Kong government on 23 October 2019.<sup>7</sup>

Still, this text represents the first attempt to introduce a legal basis to conclude regional surrender mechanism between Hong Kong, and other parts of the PRC, and this could be a first blueprint on the basis of which drafting future draft legislative proposals if there are going to be any. It is thus interesting to look at the features of the special surrender arrangements this FOO Amendment envisaged. Considering that the protests mainly concerned the possibility of extradition from Hong Kong to Mainland China, the paper will focus in particular on how the envisaged special arrangements provision would have applied to extradition between these two regions, and what legal (and political) challenges that extradition between these two regions could have faced.

Extradition procedures raise issues of sovereignty and protection of human rights. Complying with an extradition request implies for a State to exercise coercive powers on its territory, limiting the requested person's freedom, to serve a different State's enforcement needs. It also means taking the responsibility for surrendering an individual to a different jurisdiction, where his/her fundamental rights might be at risk. In light of this, states have different approaches as to extradition which require more or less formalities as well as substantive and procedural steps before an agreement to an extradition request can be granted. These different approaches are reflected in domestic legislation on extradition,<sup>8</sup> as well as in international extradition agreements concluded between States. Traditionally, extradition treaties envisage a list of well-established grounds for refusal for extradition, such as 'double criminality', or 'political offence' and in practice allow to maintain a significant degree of control on the decision to extradite or not, and through that to protect their sovereignty.<sup>9</sup> However, states with particular historical and political ties, like Brasil and Portugal have concluded agreements between them which softened some of these grounds for refusal,<sup>10</sup> and there are examples of significantly more integrated ~~stringent~~ framework like the EU Framework Decision on the European Arrest Warrant (EAW FD), which regulates extradition between the Member States of the European

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<sup>7</sup> Ben Graham, 'Hong Kong leaders Carrie Lam announces withdrawal of extradition bill that sparked months of protests' Sky News (5 September 2019) <<https://www.news.com.au/world/asia/withdrawal-of-hong-kong-extradition-bill-tipped/news-story/a0e93fa74c87894e9f4e6359dc279cd1>> Accessed 20th October 2019.

<sup>8</sup> For instance Japanese law allows extradition even without the presence of a Treaty, and only on reciprocity basis (Act of Extradition, Act No. 68 of July 21st, 1953), whereas Belgian law always require the presence of a Treaty *jointly* with assurances of reciprocity (Belgian Loi sur les extraditions du 15 mars 1874 (modifiée par la loi du 31 juillet 1985).

<sup>9</sup> See extensively, M J Costa, Extradition Law - Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond (Brill 2019).

<sup>10</sup> See more extensively on how historical or political ties have led to eliminating or softening traditional grounds for refusal M J Costa, Policies of International Friendship in Judicial Cooperation in Criminal Matters: The Non-Extradition of Brazilian and Portuguese Nationals to Third States – A Comparison with EU Law, (2019) 5(2) Revista Brasileira de Direito Processual Penal 737.

Union.<sup>11</sup> The EAW FD, introduces a semi-automatic system of surrender, implementing the EU principle of mutual recognition,<sup>12</sup> leaving EU Member States a very limited room for refusing surrender. The introduction of such an advanced system<sup>13</sup> was possible because the EU Member States are part of an integrated legal order, having already given up part of their sovereignty. They are moreover subject to similar fundamental rights obligations, stemming from EU Law,<sup>14</sup> and from the European Convention on Human Rights.<sup>15</sup> This implies that in principle EU Member States should be able to trust one another that an equal protection of fundamental rights applies through Europe, and the system is indeed said to be based on the principle of mutual trust.<sup>16</sup>

The legal situation concerning Hong Kong and mainland China is a constitutionally unique one, different from the relation between two sovereign states, as that between EU Member States, but also from that [between a state or province and the federal government in a federal system](#). On the one hand, these two are technically two regions of the same sovereign State, the People's Republic of China. Extradition between these two regions does not raise "sovereignty issues", as it is a question of *internal* cooperation, as opposed to *international* cooperation, as it is the case for instance for European Arrest Warrants. On the other hand, under the "One Country, Two Systems" policy, which will be more thoroughly explained below, Hong Kong enjoys a high degree of autonomy and has a legal system different from that in the Mainland, including in terms of applicable fundamental rights standards, which may create hurdles to the cooperation between the two regions.

Against this background, the aim of the article is to discuss the main characteristics of the proposed amendments to the FOO, and to assess the degree of cooperation it envisaged between Hong Kong and mainland China. It will keep as an informal term of comparison on the one hand, the EAW FD - as an example of a particularly advanced system of extradition, ~~still~~ between sovereign states, but which requires an important compression of sovereignty, to ensure effective surrender. And on the other hand, it will keep the text of the FOO, which includes standard extradition law

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<sup>11</sup>Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States [2002] OJ L 190/1 (hereinafter EAW FD).

<sup>12</sup> In essence, in the criminal law field, the mutual recognition principle requires member states to give full recognition to judicial decisions taken in other jurisdictions across the EU, see Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJC12/10, also see C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013), especially chapter 5 to 8.

<sup>13</sup> For a comprehensive analysis see R Bleckxtoon and W van Ballegooij (eds), *Handbook on the European Arrest Warrant* (The Hague, TMC Asser Press 2005), also see J Spencer, 'The European Arrest Warrant' (2005) 6 *Cambridge Yearbook of European Legal Studies* 201.

<sup>14</sup> Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

<sup>15</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), of 5 November 1956, ETS 005.

<sup>16</sup> Court of Justice, Opinion 2/13 of 18th December 2014, para. 191. See however, *infra* n 55, on the recent challenges the principle of mutual trust is facing.

clauses, and the UN model extradition Treaty,<sup>17</sup> as examples of agreements which put a higher number of obstacles to extradition privileging the safeguard of sovereignty. The article will illustrate that the proposed amendment the FOO put more hurdles to extradition to Mainland China, than to third states, being in some case even more restrictive than standard extradition Treaties.

The analysis is structured as follows. In a first section, this paper clarifies the background and the legal context in which the amendment was proposed, clarifying the status of the different administrative regions in the PRC, and the "One Country, Two System" principle (I). The following one look at the grounds for refusal of surrender (II); a third section addresses the procedural safeguards granted during surrender (III).

## THE BACKGROUND TO THE 2019 FOO AMENDMENT PROPOSAL

After having been for long time under British ruling, Hong Kong was returned to the PRC in 1997, as a result of the "Joint Declaration on the question of Hong Kong", an international Treaty, signed between the United Kingdom and the PRC.<sup>18</sup> Hong Kong has since then been a "Special Administrative Region (SAR)" within the PRC, governed by the Basic Law of Hong Kong.<sup>19</sup> Similarly to Hong Kong also Macao is a SAR governed by the Basic Law of Macao.<sup>20</sup> Taiwan is conversely not a SAR, and its status is contested. According to the official position of the PRC, Taiwan is part of the PRC, indeed, the Preamble of the PRC Constitution declares that Taiwan is part of the sacred territory of the People's Republic of China.<sup>21</sup> The PRC sovereignty claim over Taiwan is however contested by the government of Taiwan which claims full sovereignty over the island, and it claims to be the legitimate successor of the Republic of China. However, only 15 countries officially recognize it as an independent state.<sup>22</sup>

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<sup>17</sup> The text of the UN Model Extradition Treaty is available at: <[https://www.unodc.org/documents/treaties/model\\_treaty\\_extradition.pdf](https://www.unodc.org/documents/treaties/model_treaty_extradition.pdf)> Accessed 22nd of July 2020.

<sup>18</sup> Joint Declaration of the Government of United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (UK-China) (signed 19 December 1984, entry into force 27 May 1985) UNTS23391.

<sup>19</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, available at: <[https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw\\_full\\_text\\_en.pdf](https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf)> Accessed 18th April 2020 (hereafter Hong Kong Basic Law).

<sup>20</sup> "Basic Law of the Macau Special Administrative Region of the People's Republic of China" available at: <[https://web.archive.org/web/20010320024207/http://www.imprensa.macao.gov.mo/bo/i/1999/leibasica/index\\_uk.asp](https://web.archive.org/web/20010320024207/http://www.imprensa.macao.gov.mo/bo/i/1999/leibasica/index_uk.asp)> Accessed 22nd July 2020.

<sup>21</sup> Constitution of People's Republic of China, available at: <http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml> Accessed 22nd July 2020.

<sup>22</sup> Guatemala, Haiti, Honduras, Nicaragua, El Salvador, Swaziland, Solomon Islands, Belize, Saint Lucia, Kiribati, Saint Vincent And The Grenadines, Marshall Islands, Saint Kitts and Nevis, Palau.

The portion of the PRC which excludes Hong Kong, Macao and Taiwan, is traditionally referred to as "mainland China".

After the PRC resumed sovereignty over Hong Kong, the question arose as to how to deal with the stark differences in terms of political and legal systems between Hong Kong and the Mainland. To address this issue, as mentioned, the 'One Country, Two Systems' principle was introduced,<sup>23</sup> according to which Hong Kong maintains its capitalistic system without having to adopt the Chinese socialist system, and all the laws previously in force in Hong Kong also have been maintained except those inconsistent with the Hong Kong Basic Law.<sup>24</sup> In observance to the principle, Hong Kong is granted a high degree of autonomy, except for the foreign affairs relating to, and the defence of, the Special Administrative Region.<sup>25</sup> Accordingly, Hong Kong exercises executive, legislative and independent judicial power,<sup>26</sup> and has significant autonomy in *external affairs*, for instance in making appropriate arrangements with foreign states for reciprocal juridical assistance.<sup>27</sup>

For what concerns more specifically, the topic of this analysis, namely judicial cooperation between Hong Kong and mainland China, the Hong Kong Basic law stipulates in Art. 95 that the Special Administrative Regions may "[...] through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other". There exist interesting examples of judicial cooperation mechanisms between Hong Kong and mainland China, such as a mechanism to notify Imposition of Criminal Compulsory Measures or the Institution of Criminal Prosecution by the government of both sides on residents of the other side.<sup>28</sup> There is, however, no record of Art. 95 Hong Kong Basic Law being relied upon as a stand-alone legal basis for extradition between mainland China and Hong Kong,<sup>29</sup> nor of a legal basis for surrender between the two regions.

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<sup>23</sup> See the preamble and Chapter 1 of the Hong Kong Basic Law, n 19.

<sup>24</sup> Art 8 Hong Kong Basic Law, n 19. Most significantly, based on Article 18(2) of the Hong Kong Basic Law, national laws (i.e. those drafted and adopted by the National People's Congress or its Standing Committee in mainland China) simply do not apply to Hong Kong except those few explicitly listed in Annex III of the HK Basic Law.

<sup>25</sup> See Arts 13 and 14 of the Hong Kong Basic Law, n 19.

<sup>26</sup> Art. 2 Hong Kong Basic Law, n 19.

<sup>27</sup> See Art 96 of the Hong Kong Basic Law and the subsequent discussion in this article on extradition treaties concluded by Hong Kong.

<sup>28</sup> See 'Arrangements on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region Relating to Situations Including the Imposition of Criminal Compulsory Measures or the Institution of Criminal Prosecution' see Hong Kong Government Press release, (14 December 2017), available at:

< <https://www.info.gov.hk/gia/general/201712/14/P2017121400516.htm?fontSize=2> > Accessed on 23rd July 2020.

<sup>29</sup> Manero de Lemos M and T Lancy Robalo, Judicial cooperation in criminal matters in the Special Administrative Regions of Hong Kong and Macau. Through the lens of "one country, two systems" and the surrender of fugitives to Mainland China, (2019) 5(2) Revista Brasileira de Direito Processual Penal 737, 749. For cooperation outside criminal justice field see however,

Extradition from and to Hong Kong is regulated by domestic law, the Fugitive Offenders Ordinance.<sup>30</sup> Part I, Section 2 of the ordinance limits its scope of application to "arrangements for the surrender of fugitive offenders" applicable to the Government of Hong Kong and the government of a place outside Hong Kong *other than* the Central People's Government or the government of any other part of the People's Republic of China. This provides the legal basis for Hong Kong to conclude agreements with third countries, and Hong Kong has signed several extradition Treaties with third countries, some of which do not have an agreement with the PRC.<sup>31</sup> Cooperation between Hong Kong and third states has run quite smoothly in the past years, with only some exceptions.<sup>32</sup> Though, in July 2020, an international coalition of lawmakers, the Inter-Parliamentary Alliance on China (IPAC), has called for a suspension of third states extradition Treaties with Hong Kong,<sup>33</sup> with Canada being the first to act in this respect,<sup>34</sup> Australia,<sup>35</sup> and the UK following shortly after.<sup>36</sup> The reason for this campaign was the adoption by the Chinese Central Government of the National security Law for Hong Kong.<sup>37</sup> As per Hong Kong Basic Law, Hong Kong should adopt its own laws protecting the security of the PRC, including criminalising a number of political offences.<sup>38</sup> This legislation has however never been adopted by Hong Kong legislative Council, because it has long been considered a too sensitive political issue which could potentially infringe on individual freedoms and democracy.<sup>39</sup> The Chinese central government has adopted in July 2020 the security law mentioned above which would apply to Hong Kong territory, filling this legal vacuum. The law was however judged severely

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<sup>30</sup> *Supra* n 2.

<sup>31</sup> For a list of List of Surrender of Fugitive Offenders Agreements in Hong Kong see < <https://www.doj.gov.hk/eng/laws/table4ti.html> > , Accessed 22nd July 2020. Among these Australia, Germany, Britain, the US, India, Singapore and Malaysia do not have an agreement with China.

<sup>32</sup> See for instance the observations on the Snowden case in, Manero de Lemos and Lancy Robalo, n 29, 751 and the literature there mentioned.

<sup>33</sup> Interparliamentary-Alliance on China (IPAC), No Extradition to Hong Kong, statement available at: <<https://www.ipac.global/campaigns/no-extradition>>. Accessed 16 July 2020.

<sup>34</sup> Canada suspends extradition treaty with Hong Kong over new security law, The Canadian Press, (3July2020), available at: <<https://www.cbc.ca/news/politics/canada-suspending-extradition-treaty-hong-kong-over-security-law-1.5636479>> Accessed 16th July 2020.

<sup>35</sup> National Security Law, Australia suspend extradition treaty with Hong Kong, BBC News, (9July2020) <<https://www.bbc.co.uk/news/world-australia-53344013>>. Accessed 20th July 2020.

<sup>36</sup> UK to change extradition deal with Hong Kong - PM, BBC News, (20July2020), < <https://www.bbc.co.uk/news/uk-politics-53463405> >. Accessed on 20th July 2020.

<sup>37</sup> The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, G.N. (E.) 72 of 2020. An English version of the text can be found at: <<https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>>. Accessed 22nd July 2020. Technically, the Law on Safeguarding National Security in the Hong Kong Special Administrative Region was adopted by the Standing Committee of the National People's Congress and gazetted for promulgation by the HK Government'

<sup>38</sup> Art. 23 Hong Kong Basic Law, n 19.

<sup>39</sup> S Young, 'Guide to Basic Law Article 23: Hong Kong's Unresolved National Security Issue' (HKU legal Scholarship Blog, March 2015)<<http://researchblog.law.hku.hk/2015/03/guide-to-basic-law-article-23-hong.html>>. Accessed 18th February 2020



restricting the rule of law,<sup>40</sup> and threatening the "One country two Systems" principle,<sup>41</sup> hence the call for suspending extraditions to Hong Kong, which because of this new regime in force has allegedly become a not trustworthy extradition partner. Interestingly, these events already illustrate how Hong Kong external relations with third states are in practice influenced by Hong Kong relations with the Central People's government. As the article will also clarify, the question of political offences, would have posed problems in implementing the proposed amendment to the FOO.

For what concern internal cooperation with mainland China however, given the explicit exclusion of surrender to other parts of the PRC which, as mentioned, we find in Part 2 of the FOO, the text in its current form could not function as a legal basis for extradition between Hong Kong and the Mainland. The cases in the past in which surrender of offenders occurred between the two regions were based on ad hoc informal arrangements, and mainly these were cases of authorities from Mainland China surrendering fugitives to Hong Kong.<sup>42</sup> The ad hoc nature of these surrender arrangements has however been criticized and discussions on establishing a more institutionalised framework for surrender between Hong Kong and Mainland China have been going on for quite some years.<sup>43</sup> However, resistance existed, especially on Hong Kong side, due to important differences, not lastly, in terms of fundamental rights protection, between the two regions. For instance, while both Regions are jointly part to some international fundamental rights instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>44</sup> other key instruments such as the International Convention on Civil and Political Rights, are in force in Hong

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<sup>40</sup> See the IPAC statement, n 34.

<sup>41</sup> See Trudeau's statement, n 35.

<sup>42</sup> Manero de Lemos and Lancy Robalo, n 29, 749 et ff. See for a recent case: Mainland Chinese police to Hong Kong criminals: you can run, but you can't hide here – as they hand back three suspects in HK\$23 million jewellery robbery, South China Morning Post (4August2018), <<https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2158290/mainland-police-tell-hong-kongs-criminals-you>> The article mentions at least cases only in 2018 of these informal surrenders.

<sup>43</sup> See on the critics, the position of Professor Song Xiaozhuang, of Shenzhen University's Centre for Basic Laws of Hong Kong and Macau reported in South China Morning Post, n 42. The Hong Kong Legislative Committee minutes illustrate how the surrender between Mainland China and Hong Kong were often discussed in the Committee in the past 20 years. For instance, the issue was discussed in 2008, 2016 and several other years, see:

<https://search.legco.gov.hk/LegCoWeb/Search.aspx?lang=en&searchtype=simple&keyword=surrender+offenders+HK+mainland+China> accessed 17 April 2020. In 2001 the HK Legislative Council Secretary also did one comprehensive Research on the question surrender between Mainland China and Hong Kong. See Chau Pak-kwan and Stephen Lam, 'Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders' (2001) Research and Library Service Division and Legal Service Division Legislative Council Secretariat <<https://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>> Accessed 17th April 2020.

<sup>44</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entry into force 26 June 1987) UNTS1465(UNCAT).



Kong<sup>45</sup>, but have only been signed and not ratified by the PRC.<sup>46</sup> Next to questions related to the applicable fundamental rights framework, concerns have been raised on the actual enforcement of fundamental rights in Mainland China,<sup>47</sup> and these have been listed as a potential obstacle to establishing a long-lasting surrender agreement.<sup>48</sup> On Mainland side, it was reported, concerns existed on introducing a surrender mechanism which includes political offence and non-surrender of nationals as grounds for refusal.<sup>49</sup>

It was in this context that the high-profile murder mentioned above provided the trigger to finally table a proposal for amending the FOO, and introducing a new Section, Section 3.A, dealing with '*Special arrangements* for surrender of fugitive offenders' - as opposed to simply *arrangements* dealt with by Section 2 mentioned above.<sup>50</sup> These special arrangements are referred to in the proposed Section 3.A(1) as applying 'between Hong Kong and the place outside Hong Kong'. The mention to excluding other parts of the PRC has disappeared. The amendment would have made this amendment a suitable legal basis for arrangement between Hong Kong and Mainland China, which was the key issue triggering the protests.

In this sense the proposal for establishing a surrender mechanism share some similarities with the 'event-driven' origin of the EAW FD, which was also proposed and quickly approved by the EU Member States in the aftermath of the 9/11 Terrorist attacks, although of course the two triggering events are of a completely different scale, and, in fact, there have, however, been accusation that the murder was simply a pre-text for proposing the amendment to the FOO.<sup>51</sup> However, of course the EAW is a piece of EU law, a sui generis form of international law, mutually agreed on by all parties

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<sup>45</sup> See International Convention on Civil and Political Right (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), also see Department of Justice of Hong Kong government, 'List of Treaties in Force and Application to the Hong Kong Special Administrative Region' (7 May 2019), <<https://www.doi.gov.hk/eng/laws/interlaw.html>>. Accessed 26th February 2020. The Hong Kong Bill of Rights Ordinance was enacted in 1991 to give effect to the relevant provisions of the International Convention on Civil and Political Rights. Regarding this, see Chapter 383 Hong Kong Bill of Rights Ordinance Chapter 383, Available at: <[https://www.elegislation.gov.hk/hk/cap383/en-sc?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap383/en-sc?INDEX_CS=N)> Accessed 26th February 2020.

<sup>46</sup> China signed the Convention on October 5 1998, but the National Congress has still not ratified it. See list of ratifications at: <<https://indicators.ohchr.org/>> Accessed 11 May 2020.

<sup>47</sup> Regarding this, see Human Rights Watch Reports, 'World Report 2020' <<https://www.hrw.org/world-report/2020>>. Accessed 18th April 2020, 'China: Rampant Violence and Intimidation Against Petitioners' (8 December 2005) <<https://www.hrw.org/news/2005/12/08/china-rampant-violence-and-intimidation-against-petitioners>>. Accessed on 18 April 2020, as well as the Amnesty International, 'China Human Rights' <<https://www.amnestyusa.org/countries/china/>>. Accessed 26th February 2020.

<sup>48</sup> See the 2009 statement by Margaret NG, member of the Hong Kong legislative council reported in Manero de Lemos and Lancy Robalo, n 29, 757.

<sup>49</sup> South China Morning Post, n 42. On political offence and surrender of nationals see infra the next section.

<sup>50</sup> Emphasis added.

<sup>51</sup> On the EAW and 9/11, see J Wouters & F Naert, 'Of Arrest Warrant, Terrorist Offences and Extradition Deals. An Appraisal of the EU's Main Criminal Law measures against Terrorism after '11 September'(2004), Working Paper No 56, Leuven Institute for International Law <<https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP56e.pdf>>. Accessed 20th October 2019. Conversely, on criticism being moved to the murder in Taiwan being simply a pretext for the proposal of the FOO Amendment see Hong Kong Free press n 1.

involved, and which was enacted as part of a broader EU Constitutional objective, enshrined in the Treaty on the European Union of establishing an Area of Freedom, Security and Justice within the EU.<sup>52</sup> Whereas, the FOO Amendment, was not an international Treaty, but rather an unilateral amendment to domestic legislation - though the Chinese government has shown support and willingness to introduce a legal basis for surrender with Hong Kong<sup>53</sup> - and it was not formally linked to any broader constitutional objective enshrined in either the PRC constitution, or Hong Kong Basic Law. It was more targeted to solve this one cross-border murder case, and possible other future cross-border criminal cases.<sup>54</sup> Most importantly, the adoption of the EAW FD was grounded on the assumption of mutual trust between EU Member States that a similar level of fundamental rights would apply throughout the EU. The discussions on establishing extradition proceedings between Hong Kong and mainland China were conversely characterized by mistrust, as highlighted above, and the following paragraph will show how such mistrust has also shaped the provisions of the FOO Amendment, setting in some cases stricter conditions for extradition from Hong Kong to mainland China, than from Hong Kong to third states. It should be noted that the need of trust in extradition partners is not only a political issue, but has also a legal dimension. Indeed, with reference to the case in point, it has been convincingly argued that Hong Kong could face legal responsibilities for having violated its human rights obligations under the International Covenant on Civil and Political Rights, if it were to authorise extradition to mainland China, and the surrendered person were to see his/her fundamental rights there violated.<sup>55</sup>

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<sup>52</sup> Art. 29(1) TEU [consolidated in Amsterdam] stipulates that "[...] Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime [...] through closer cooperation between [...] judicial and other competent authorities of the Member States)". See also para. 5 in the preamble to the Framework Decision on the European Arrest Warrant, which stipulates "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities".

<sup>53</sup> A Wallace, AFP, 'Beijing backs Hong Kong over amendments to extradition laws - China pledges "firm support" for Hong Kong leaders Carrie Lam after mass rally against planned changes to rendition laws' ALJAZEERA(10June2019)<<https://www.aljazeera.com/news/2019/06/beijing-backs-hong-kong-amendments-extradition-laws-190610084831337.html>>. Accessed 24 February 2020.

<sup>54</sup> Hong Kong leader Carrie Lam had argued the extradition bill must be passed before Chan, the culprit - who was jailed for a different crime than the murder - is freed and to plug existing loopholes, although it was mentioned, there are also critics that this was only a pretext to proposed the FOO Amendment. See Hong Kong Free Press News, n 1.

<sup>55</sup> K Bovend'Eerd, Look before you leap: the 2019 extradition bill amendments in light of Hong Kong's international human rights obligations, EJIL: Talk!, 25th July 2019, < <https://www.ejiltalk.org/look-before-you-leap-the-2019-extradition-bill-amendments-in-light-of-hong-kongs-international-human-rights-obligations/> > Accessed 26th July 2020.

Interestingly, and to stress the capital importance and fragility of mutual trust, even in the case of the EU Member States - which are much more legally and politically integrated, subject to the same fundamental rights obligations, and collectively with a track record of fundamental rights enforcement which is not comparable to that of mainland China - the assumption of mutual trust is being questioned, mainly due to prison conditions in a selected number of prisons in a number of Member States, and the EAW system is now also being put under pressure.<sup>56</sup> In this case as well, it is argued that Member States could face responsibilities for having violated their fundamental rights obligations under the ECHR, if they were to surrender individuals to another Member State where his/her fundamental rights could be violated.<sup>57</sup>

## II - CASE BY CASE APPROACH AND GROUNDS FOR REFUSAL

The proposed FOO amendment opened the door to establishing special surrender arrangements between Hong Kong and Mainland China, but on a case by case approach, without establishing any obligation for the parties to extradite.

The FOO includes a number of grounds Hong Kong authorities can rely on to refuse surrender to third states, or submit it to specific conditions, and these would have similarly applied to surrender to Mainland China, under the amended provision. These are mostly standard grounds for refusal one finds in extradition Treaties or to a certain extent in the EAW FD. Some of them would not pose particular problem for surrenders to Mainland China. This is for instance, the case for the double jeopardy principle,<sup>58</sup> or statutes of limitation.<sup>59</sup> In particular, the latter ground for refusal, is unlikely

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<sup>56</sup> See F M. W. Billing, Limiting mutual trust on fundamental rights grounds under the European arrest warrant and lessons learned from transfers under Dublin III (2020) 11(2) NJECL 184, and A Martufi, D Gigengack Exploring mutual trust through the lens of an executing judicial authority. The practice of the Court of Amsterdam in EAW proceedings, (2020) 11(3) NJECL [forthcoming].

<sup>57</sup> I Wiczorek, The impact of the Radu case on national jurisdictions. In V Mitsilegas, A di Martino, L Mancano, The Court of Justice and European Criminal Law. Leading Cases in Contextual Analysis (Hart Publishing, 2020).

<sup>58</sup> See Part 1, Section 5(1)e of FOO, n 2, see by comparison Art. 3(2) EAW FD, n 11, and Art. 3(d) UN Model Treaty for Extradition, n 17.

<sup>59</sup> This is a classic ground for refusal one finds, for instance, in Art. 3(e) UN Model Treaty on Extradition, n 1 but also in See Art. 4(4) of the EAW FD, 11. This ground for refusal is not explicitly acknowledged in the FOO, but was inserted by Hong Kong in all extradition Treaties concluded with third parties. See by way of example 6(2),8(2)(c) of the agreement with Canada, n 30, Article 5(2),8(2) of the agreement with the UK, n 30, article 7(b),9(2)(c) of the agreement with Sri Lanka, n 30, article 7, 9(2)(c) of the agreement with Portugal, available at, n 31, to name but few.

And, with specific respect to the FOO amendment, the Hong Kong government has insisted that it will authorise surrender, only if the statute of limitation for the offence for which surrender has been asked has not expired under the law of the requesting region, and it has put special emphasis on the need to receive assurances in this respect. See Statement by Secretary of HK Security Bureau, n 5. See also paragraph 18 of, 'Hong Kong Bar Association Complementary Opinion to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019' (June 6, 2019), <<https://www.hkba.org/sites/default/files/%E9%A6%99%E6%B8%AF%E5%A4%A7%E5%BE%8B%E5%B8%AB%E5%85%A>

to be an issue when cooperating with mainland China, considering that statutes of limitation are there very long in general,<sup>60</sup> and, in murder cases, when necessary, the effective prosecution period can be unlimited under the permission of Supreme People's Prosecutor's Office.<sup>61</sup>

A ground for refusal included in the original FOO which could conversely have posed particular problems when dealing with Mainland China, includes for instance, the death penalty based one. In cases in which the relevant offence is punishable in the requesting state with capital punishment, Hong Kong would only surrender under reassurance that death penalty would not be imposed.<sup>62</sup> Death penalty was abolished in Hong Kong in 1993, however it remains in force in Mainland China, and it is enforced in practice. A similar clause is not present in the EAW FD, as no EU Member State has retained capital punishment, but can be found in international treaties between abolitionist and retentionist states, such as the extradition Treaty between the EU and the US which includes a number of federate states which are retentionist states.<sup>63</sup>

Other aspects of the FOO which would be similarly problematic were Hong Kong to establish a special surrender arrangement with Mainland China, are the political offence-based ground for refusal, and actually the *absence* of a ground for non-surrender of Hong Kong residents. These are discussed in more detail in the next and following paragraphs.

Finally, two grounds for refusal, namely double criminality and penalty thresholds, have been regulated differently by the amendment than in the original FOO. A fourth paragraph discusses these in more detail, and it illustrates how in this respect surrender from Hong Kong to Mainland China would have been more difficult than to third countries.

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[C%E6%9C%83%E9%87%9D%E5%B0%8D%E3%80%A2019%20%E5%B9%B4%E9%80%83%E7%8A%AF%E5%8F%8A%E5%88%91%E4%BA%8B%E4%BA%8B%E5%AE%9C%E7%9B%B8%E4%BA%92%E6%B3%95%E5%BE%8B%E5%8D%94%E5%8A%A9%E6%B3%95%E4%BE%8B%28%E4%BF%AE%E8%A8%82%29%E6%A2%9D%E4%BE%8B%E8%8D%89%E6%A1%88%E3%80%8B%E7%9A%84%E8%A3%9C%E5%85%85%E6%84%8F%E8%A6%8B%E6%9B%B8\\_0.pdf](http://www.npc.gov.cn/wxzl/wxzl/2000-12/17/content_4680.htm)

Accessed 20 October 2019. (hereafter HK Bar Association Opinion)

<sup>60</sup> In general, the prosecution period can be 5 years, 10 years, 15 years, 20 years depending on the maximum imprisonment time of the offence. Regarding this, see article 87 of Chinese Criminal Code, <[http://www.npc.gov.cn/wxzl/wxzl/2000-12/17/content\\_4680.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/17/content_4680.htm)>. Accessed 25th February 2020.

<sup>61</sup> Ibid.

<sup>62</sup> See Part 2, Section 13(5)b, of FOO, n 2. Also see the agreements Hong Kong has signed with other countries, which include similar provisions, <<https://www.doj.gov.hk/eng/laws/table4ti.html>> Accessed 12th April 2020.

<sup>63</sup> Art. 13, Agreement on extradition between the European Union and the United States of America [2003] OJ L 181/27. The UN Model extradition Treaty includes this ground among the optional ones (Art. 4(d)), n 17.

## *Political Offence*

The political character of the offence is also a typical ground of refusal in extradition law. This principle is regarded as the result of the nineteenth century political revolutions in Europe,<sup>64</sup> and has been widely recognized in modern extradition relations,<sup>65</sup> exception made for the EAW FD which has innovatively eliminated it, whereas it still exists under the FOO,<sup>66</sup> and has been left unaltered in the proposed Amendment to the FOO.

As mentioned already, the Basic law of Hong Kong Special Administrative Region requires Hong Kong to protect the national security of PRC, and it imposes the obligation for Hong Kong to enact domestic law criminalising a number of offences that can be qualified as “political offences”.<sup>67</sup> These include the act of treason; secession; sedition; subversion against the Central Government of the People’s Republic of China; theft of state secrets; political activities of foreign political organizations or bodies based in Hong Kong which interfere with internal affairs of the PRC and which interfere with the "One country, Two systems" principle; the activities of political organizations or bodies in Hong Kong establishing ties with foreign political organizations or bodies.<sup>68</sup>

However, the Hong Kong legislative council has not adopted legislation on this point, since as was stated already this is a sensitive topic. In any case these offences were not listed under the 37 offences for which surrender is allowed.<sup>69</sup> Against this background, the political offence ground for refusal therefore was not likely to be of great relevance for surrender between mainland China and Hong Kong. This of course should be distinguished from the situation of prosecution for offences which are not formally political ones, for instance corruption offences, but where prosecution, and consequentially the request for extradition, is in fact made for the purpose of prosecuting or punishing the offender on account of his/her political opinions, for which the FOO also include an ad hoc ground for refusal,<sup>70</sup> which conversely would have been highly relevant.

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<sup>64</sup> See Charles L Cantrell, ‘The Political Offences Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland’ (1977)60(3) Marquette Law Review 777.

<sup>65</sup> This principle can be found in article 3 of UN model extradition Treaty, n 17, article 3 of 1957 Council of Europe extradition Convention 1957, <<https://rm.coe.int/1680064587>>, Accessed 22nd July 2020, also in multilateral or bilateral extradition treaties, like the article 4 of UK-US extradition treaty 2003 <<https://www.congress.gov/108/cdoc/tdoc23/CDQC-108tdoc23.pdf>>. Accessed 22nd July 2020. and in the domestic extradition law, for instance article 8 of China extradition law, <[http://www.npc.gov.cn/wxzl/gongbao/2001-03/05/content\\_5123887.htm](http://www.npc.gov.cn/wxzl/gongbao/2001-03/05/content_5123887.htm)>. Accessed 18th April 2020.

<sup>66</sup> See Part 1, Section 4, paragraph (5) of the FOO, n 2.

<sup>67</sup> See Art. 23 of Basic Law, n 19.

<sup>68</sup> The list of offences is included in Art. 23 of the Basic Law, n 20, on this see Simon Young, ‘Guide to Basic Law Article 23: Hong Kong’s Unresolved National Security Issue’ (HKU legal Scholarship Blog, March 2015)<<http://researchblog.law.hku.hk/2015/03/guide-to-basic-law-article-23-hong.html>>. Accessed 18th February 2020.

<sup>69</sup> See the next paragraph on this point.

<sup>70</sup> Art. 5(1)c FOO, n 2.

The Central People's Government has however now adopted the Law on Safeguarding National Security in Hong Kong (HK National Security Law) which provides definitions and penalties on secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security.<sup>71</sup> According to this law, the Hong Kong Special Administrative Region shall have the jurisdiction over cases concerning the above 4 offences,<sup>72</sup> but under specific situations the Central People's Government can exercise jurisdiction having the relevant cases investigated, prosecuted and tried by mainland China organs.<sup>73</sup> Were the Hong Kong government to amend the FOO again in the future to allow for special surrender arrangements to be concluded with mainland China, maintaining and applying the political offence ground for refusal could actually represent a challenge. Indeed, complying with the FOO, denying refusal of surrender to mainland China for political offences, while at the same time fulfilling the obligation of protecting national security under Hong Kong National Security Law, would represent a challenge for Hong Kong in specific cases in which suspects present on its territory are prosecuted for the said political offences and are wanted by mainland China.

Admittedly, the relation between extradition and political offences is generally a sensitive topic. Even in the context of the EU, which was taken as an example of a particularly integrated legal and political system where this ground for refusal has been eliminated, the question of EAWs and political offence rose. After the failure of the independence referendum in Catalonia in 2017, the former president, Charles Puigdemont was in self-exile first in Belgium and then in Germany.<sup>74</sup> The Spanish Supreme Court issued an EAW to ask for his surrender under the charge of misuse of public funds and rebellion (this charge was later changed to sedition).<sup>75</sup> This was clearly a very sensitive case, and the offence was potentially a political offence, for which however, as mentioned, the EAW FD does not grant any exception. However, the German Court, which had received an EAW request from Spain, could refuse

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<sup>71</sup> See Chapter III of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HK NSL).

<sup>72</sup> See Article 40 of HK NSL.

<sup>73</sup> See Article 55, 56 of HK NSL.

<sup>74</sup> 'Case 15-Carles Puigdemont, President of Catalonia in exile' (January 2019)', <http://wereport.cat/carles-puigdemont-president-of-catalonia-in-exile/> Accessed 20th July 2020.

<<https://wereport.cat/wp-content/uploads/2019/01/CASE-15-Carles-Puigdemont.pdf>> Accessed 15th April 2020.

<sup>75</sup> Catalonia independence protests, 'Catalonia crisis: Spain issues warrant for Puigdemont' BBC (November 3 2017) <<https://www.bbc.com/news/world-europe-41865121>> Accessed 22nd July 2020; Cristina Abellan Matamoros, 'Finnish police receive arrest warrant for Puigdemont, but they don't know where he is' Euronews (24 March 2018) <<https://www.euronews.com/2018/03/24/finnish-police-receive-arrest-warrant-for-puigdemont-but-whereabout-unknown>>.

Accessed 20th July 2020; Diego Torres & James Randerson, 'Spain's Supreme Court issues new Carles Puigdemont arrest warrant' POLITICO (14 October 2019) <<https://www.politico.eu/article/spain-supreme-court-issues-new-carles-puigdemont-arrest-warrant/>> Accessed April 15th 2020.



the surrender on the technical ground that the offence of 'rebellion' did not exist as such under German law, and was not among the offences for which double criminality had been eliminated.<sup>76</sup> To adopt a similar strategy - namely to rely on double-criminality, rather than on the political offence grounds for refusal - in extradition between Hong Kong and mainland China would however not be that easy. Indeed, it would be necessary for Hong Kong to provide its own definition of these political offences. In a case concerning a political offence, if these were to fall under the extraditable offences category, Hong Kong could then only allow surrender to mainland China only for facts also criminalised in Hong Kong, without having to rely on the political offence ground for refusal. In this respect, it should be noted, that the Hong Kong Secretary for Security, declared on May 2020, that "the HK National Security Law neither replaces nor excludes the relevant provisions of Basic Law". Following this statement Hong Kong would therefore not only be free to provide its own definition of political offences, but it actually has the obligation to do so as required by article 23 of Basic Law.<sup>77</sup> Against this background, relying on Hong Kong definition of crimes could in principle provide a technical solution to avoid raising the question of political offences. However, one should note that Art. 62 of the Hong Kong Security Law stipulates that it shall prevail where provisions of the domestic laws of the Hong Kong Special Administrative Region are inconsistent with the HK National Security Law. In the hypothetical scenario in which Hong Kong were to refuse surrender for any of these offences on the basis of double criminality, Mainland authorities could always refer on this provision of the Hong Kong Security Law to claim the broader definition included in the HK National Security Law should apply.

### ***Surrender of Hong Kong residents***

The fact that the requested person possesses the nationality of the requested state is another traditional ground for refusal in extradition law.<sup>78</sup> The justification for this can be that the fugitive ought not be withdrawn from his natural judges; that the state owes its subjects the protection of its laws; that there

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<sup>76</sup> See Press Department of the Oberlandesgericht for the State of Schleswig-Holstein, 'Matter Carles Puigdemont: The extradition for the accusation of embezzlement of public funds is admissible; an extradition for the accusation of rebellion is inadmissible. Carles Puigdemont remains free' (12 July 2018) <<https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201806Puigdemontenglisch.html>> Accessed 18th April 2020, On the case, See Y Yin, 'The application of European Arrest Warrant on the Case of Puigdemont' (2020) 2 National Judges College Journal 118

<sup>77</sup> See Government of Hong Kong (Gov HK) 'LCQ6: Legislation on Article 23 of Basic Law' Press Release <<https://www.info.gov.hk/gia/general/202005/27/P2020052700520.htm>> Accessed 23th July 2020.

<sup>78</sup> See Art. 4(a) of the UN Model Treaty, n 17, which lists this ground as an optional ground for refusal. See Z Deen-racasmany 'Modernizing the Nationality Exception: Is the Non-extradition of Residents a Better Rule?' (2006) 75 Nordic Journal of International Law 29.



is a lack of trust in the criminal justice system of a foreign state, especially with regard to the trial of a foreigner; and that foreigners would be in a disadvantageous position in being tried in a foreign language.<sup>79</sup> Certain countries have however softened this rule.<sup>80</sup> And this ground was also significantly attenuated in the context of the EAW FD. EU Member States cannot refuse to surrender their nationals. Nonetheless, when the surrender is for prosecution and the requested person is the national or resident of the executing Members State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State to serve the custodial sentence or detention order; similarly, when requested for sentence execution purposes, surrender can be refused if the person is a national, resident or staying in the requested state, and the said state undertakes to execute the sentence or detention order in accordance with its domestic law.<sup>81</sup>

The FOO includes prohibition of extradition of any PRC nationals as a ground for refusal,<sup>82</sup> and Hong Kong has routinely included such ground for refusal in the extradition Treaties it concluded with third states.<sup>83</sup> Considering that, at least a part of Hong Kong residents are Chinese nationals,<sup>84</sup> the question, when dealing with surrender between Hong Kong and the Mainland, is not primarily that of non-extradition of *nationals*. However, Hong Kong residents, both of Chinese nationality and of foreign nationality, enjoy a special status and can for instance be issued by Hong Kong authorities, an internationally valid Hong Kong passport. Such special status was not recognized in the FOO amendment, and no exception was included for the non-surrender of Hong Kong residents to other regions of the PRC. This was a logical choice considering that the background of the Amendment was a crime committed by a Hong Kong citizen to be surrendered to Taiwan for a murder trial. Hong Kong legislation does not include extraterritorial jurisdiction, and therefore could have not tried the Hong Kong citizens for facts committed abroad, the only solution was to extradite the Hong Kong citizen.<sup>85</sup> However, the lack of such ground for refusal has been one of the key issues which sparked concern among Hong Kong residents,<sup>86</sup> due to widespread lack of confidence in the respect of

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<sup>79</sup> See S. A. Williams, 'Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition' (1991)62 International Review of Penal Law 260.

<sup>80</sup> An example is the extradition Treaty between US and Japan, Art. 6, Japan International Extradition Treaty with the United States, signed 3th March 1978, 31 UST 892; TIAS 9625; 1203 UNTS 225. See also concerning the relation between Brasil and Portugal, n 10.

<sup>81</sup> Art. 5(3), EAW FD, n 11.

<sup>82</sup> Art. 13(4) FOO, n 2.

<sup>83</sup> See by way of example, Art. 3 of the Agreement with Australia, n 31, Art. 3 of the Agreement with Finland, n 31, Art. 3 of the Agreement with South Africa n 31.

<sup>84</sup> See Art. 24 of Hong Kong Basic Law, n 19, on who qualifies as a Hong Kong permanent or non-permanent resident.

<sup>85</sup> The lack of extraterritorial jurisdiction this is also the reason why Hong Kong refused to try the murder case occurred in Taiwan, although both the perpetrator and the victims were Hong Kong citizens.

<sup>86</sup> Hong Kong anti-government protests, 'Hong Kong protesters demonstrate against extradition bill' BBC (9June2019) < <https://www.bbc.com/news/world-asia-china-48572130> > Accessed 20th October 2019.

fundamental rights by the criminal justice, and penitentiary, system in Mainland China.<sup>87</sup> Interestingly, when the amendment was proposed even the deputy minister of Taiwan's Mainland Affairs Council declared Taiwan was not supportive of the FOO Amendment, which would have allowed the surrender of Taiwanese citizens residing in Hong Kong to mainland China.<sup>88</sup> And, the deputy minister, declared, they would have not requested the extradition of the Hong Kong citizen convicted of the murder committed in Taiwan, which had been the trigger for the proposal of the FOO Amendment.

Should the political situation in the future allow the reconsideration of a special surrender arrangement between the two regions, possibly inspiration from the EAW FD could be drawn on how to regulate the question of surrender of Hong Kong residents to mainland China. Namely, Hong Kong could still envisage the surrender of its residents to Mainland China in order to be prosecuted and face their trial but require them to be transferred back to Hong Kong to serve their sentence. This solution would respect the legal system of the requesting part, but it would also take into account the social reintegration of the requested person, who could serve the sentence closer to the family in Hong Kong; as well as ensure Hong Kong control over the respect of fundamental rights standards during the phase of sentence execution. Admittedly, however, it would not relieve the very serious concerns which can arise as to the respect of fundamental rights during the trial phase in mainland China.

### ***The double criminality principle and penalty thresholds***

The principle of double (or dual) criminality requires that the crime for which extradition is sought must be punished in both the requested and requesting states, and it is similarly a deeply ingrained principle of extradition law.<sup>89</sup> The EAW is a partial exception to this rule, to the extent that the double criminality principle has been abolished for a list of 32 offences, provided that the relevant offence is punishable with a maximum period of at least three years in the requesting state.<sup>90</sup> For the offences not included in this list, the requested Member States are allowed to check whether the act occurred in the requested State, if it constitutes crime, and the length of the penalty.<sup>91</sup>

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<sup>87</sup> J Chan, 'Ten Days that Shocked the World: the Rendition Proposal in Hong Kong' (2019)49(2) Hong Kong Law Journal 431.

<sup>88</sup> Hong Kong Free Press, n 1.

<sup>89</sup> See G Griffith and Claire Harris, 'Recent Developments in the Law of Extradition' (2005)6 Melbourne Journal of International Law 33.

<sup>90</sup> See article 2 of EAW FD, n 11.

<sup>91</sup> See Case C-289/15, *Krajsky sud v presove* [2017] ECR I-4. Also see Case C-463/15, *Openbaar Ministerie v A* [2015] ECR I-634.

Conversely, similarly, to general extradition treaties, the FOO Amendment establishes that the surrender between Hong Kong and Mainland China has to undergo a strict double criminality check. And the check is even stricter than that envisaged by the original FOO, which regulates surrender between Hong Kong and third countries.

In more detail, the original text of the FOO required the relevant offences to be punishable under both the requesting and requested parties' law with imprisonment of at least 12 months.<sup>92</sup> Moreover, it added a further restriction, in that extraditable offences were only the ones included in a list of 46 offences.<sup>93</sup> The 12 months penalty threshold can also be found in the advanced EAW FD system.<sup>94</sup> Conversely, the further inclusion of extraditable offences in a closed list is something we do not find in the EAW FD, but neither in the UN Model Extradition Treaty for instance.<sup>95</sup> This makes Hong Kong Domestic law already particularly restrictive.

The FOO Amendment goes even further. It establishes that surrender between Hong Kong and other regions of the PRC could only be authorized if the relevant offences fall within a list now of only 37 offences therefore more limited if compared to the original 46 ones.<sup>96</sup> Moreover, the FOO Amendment initially limited the surrender to offences punishable with at least 3 years imprisonment in both Hong Kong and the requesting region<sup>97</sup>, the threshold then raised to 7 years in the final version of the amendment,<sup>98</sup> following protests on the pre-existing threshold, which was considered too low.<sup>99</sup> This is a particularly high threshold, which is hardly found in extradition treaties.

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<sup>92</sup> See Part 1, Section 2(a) of the FOO, n 2.

<sup>93</sup> The 46 categories of crime include violent crimes, such as sexual crimes, drug crimes, economic crimes, crimes against public order and public safety. Regarding this, see the Schedule 1 of FOO, n 2.

<sup>94</sup> Art. 2(1) EAW FD, n 11. Note that the UN Extradition Model Treaty does not set any particular threshold, it just includes a provision for identifying the penalty threshold the parties to the Treaty deem appropriate, Art. 2(1) UN Model Extradition Treaty, n 17.

<sup>95</sup> Art. 2 UN Model Extradition Treaty, n 17.

<sup>96</sup> The 9 categories of crime excluded from the surrender scope are offences against bankruptcy law or insolvency law, offences against the law relating to companies including offences committed by officers, directors and promoters, offences relating to securities and futures trading, offences against the law on protection of intellectual property, copyrights, patents or trademarks, offences against the law relating to environmental pollution or protection of public health, offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds, offences involving the unlawful use of computers, offences relating to fiscal matters, taxes or duties, offences against the law on false or misleading trade descriptions. Regarding this, See M Hui, 'These are all the crimes Hong Kong is considering extraditing people for under a new law' QUARTZ(7June2019) <<https://qz.com/1636663/the-37-crimes-included-in-hong-kongs-proposed-extradition-law/>> Accessed 25 February 2020.

<sup>97</sup> See Article 10 part 3 of the first draft of the Amendment of Fugitive Offenders Ordinance and the Ordinance on Judicial Cooperation in Criminal Matters, <<https://www.legco.gov.hk/yr18-19/chinese/bills/b201903291.pdf>> Accessed 26th February 2020.

<sup>98</sup> See Hong Kong Bar Association, n 57.

<sup>99</sup> See Government of Hong Kong (GovHK) 'LCQ2:Human rights safeguards under Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (5June2019) Press Release <<https://www.info.gov.hk/gia/general/201906/05/P2019060500760.htm>> Accessed 20th October 2019. (hereafter Human rights safeguard in Bill)

## PROCEDURAL SAFEGUARDS

### *Role for Judicial Authorities within the procedure*

Under the FOO Amendment both administrative authorities and judicial authorities, namely courts, are involved in the procedure. In particular, the surrender procedure will be activated by a certificate issued by the Chief Executive. After the certificate is issued the "Court of committal", one of the Magistrates' court in Hong Kong, will hear the case. After the Court's decision, the Chief Executive will give a final say regarding surrender.<sup>100</sup> This means that the role of the court is limited to a prima facie, legality, check whereas all the powers of final decision remain with the executive.<sup>101</sup> Most importantly, the Chief Executive will be the body scrutinizing the protection of human rights in the requesting Region, and assessing whether it lives up to the standards of the International Convention of Civil and Political Rights and Hong Kong Human Rights Bill.<sup>102</sup>

Having the executive play an important decision-making role in extradition proceedings between sovereign states is not uncommon,<sup>103</sup> since extradition involve both legal and political considerations. Still, entrusting the Chief Executive, with the task of verifying human rights protection has raised concern for it is being considered a body less likely to be independent from authorities in Mainland China, than courts would be.<sup>104</sup>

By comparison, the EAW, which still regulates extradition among sovereign states, has however eliminated any role for the executive in authorising extradition procedure in the EU region, introducing a purely judicial procedure.<sup>105</sup> The central authorities are limited to practical and

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<sup>100</sup> See Part 2, Clause 4 of FOO Amendment, n 2, also see Part 2, section 13 of the FOO, n 2.

<sup>101</sup> See Section 10,11,12 and 13 of FOO, n 2 also see Clause 4 of FOO Amendment and Paragraph 2 of Explanatory Memorandum to FOO Amendment, n 6.

<sup>102</sup> See 7observers, 'Joint observations on the human rights implications of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019'(14June2019) <<http://www.barhumanrights.org.uk/wp-content/uploads/2019/06/FINAL-Joint-observations-on-the-human-rights-implications-of-the-Fugitive-Offenders-and-Mutual-Legal-Assistance-in-Criminal-Matters-Legislation-3.pdf>>. Accessed 20th October 2019. Also see A H.Y.Chen, 'A Perfect Storm: Hong Kong-China Rendition of Fugitive Offenders' (2019)149(2) Hong Kong Law Journal 421.

<sup>103</sup> See by way of comparison the Japanese Act of Extradition, Act No. 68 of July 21st, 1953, which envisages a role both for the Ministry of Foreign Affairs (Art. 2) and for the Ministry of Justice (Art. 14(1)); the UK Extradition Act (2003) which entrusts the Home Secretary as a key decision-maker (Art. 92 and 93); or the Belgian Loi sur les extraditions du 15 mars 1874 (modifiée par la loi du 31 juillet 1985) which entrusts the procedure to the 'Government' in Belgium (Art. 3)

<sup>104</sup> S Pepper, 'the trust deficit: why Hongkongers simply don't believe gov't reassurances over its China extraditionlaw' Hong Kong Free Press (4April2019) <https://www.hongkongfp.com/2019/04/04/trust-deficit-hongkongers-simply-dont-believe-govt-reassurances-china-extradition-law/> Accessed 20th October 2019.

<sup>105</sup> Under the EAW mechanism, the surrender is between judicial authorities, both the issuing authority and executing authority are judicial authorities. See paragraph 5 of the preamble of EAW FD, n 11 also see article 6 of the EAW FD, n 11.

administrative assistance.<sup>106</sup> The comparison is particularly striking, if one considers that the European Court of Justice has recently ruled that the German Prosecutors cannot issue the European arrest warrant because they are not independent from the executive power, namely the Ministry of Justice.<sup>107</sup> Moreover, under the EAW FD, any lower or higher Court can issue a European Arrest Warrant.<sup>108</sup> In contrast, the FOO Amendment excludes the involvement of the lower jurisdictions (courts and public prosecutors' offices) in the other administrative regions. On May 30<sup>th</sup> 2019, the Bureau of Security in Hong Kong made one additional amendment to the FOO Amendment, stating that for the purposes of obtaining surrender from Hong Kong the extradition requests from Mainland China can only be issued by the Supreme People's Court and the Supreme People's Public Prosecutor's Office.<sup>109</sup>

Granting wider power to Courts in Hong Kong in the context of surrender might help reducing public concerns regarding the protection of human rights in the surrender procedure. Since, this is a special arrangement, a different approach from the FOO, which only involves administrative authorities, is arguably possible.

Next to this reduced role for courts in the procedure, it should also be noted that there is no third impartial court which can be a last instance to oversight surrender proceedings.<sup>110</sup> Despite the two regions being part of the same sovereign country, this scenario resembles more the relation between two sovereign countries. Still, when it comes to the countries Member of the European Union, the jurisdiction of the Court of Justice of the European Union is available as a third independent judicial body overseeing the system. This means that, under the EAW mechanism, the requested person benefits from two levels of rights protection. The first level is the national level, the requested persons have the right to be heard by national courts before the surrender,<sup>111</sup> and they can also appeal to a higher court in the executing Member States.<sup>112</sup> A second level of protection will come from the EU level, mainly from the European Court of Justice through the way of preliminary rulings, as well as a

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<sup>106</sup> See point 8 and 9 in the Preamble of EAW FD, n 11.

<sup>107</sup> See Case C-508/18 and C-82/19, Minister for Justice and Equality V O.G and P.I [2019] ECR I-337, Opinion of Advocate General.

<sup>108</sup> See article 6 of the EAW FD, n 11.

<sup>109</sup> See Human Rights safeguards in Hong Kong Bill of Rights, n 44.

<sup>110</sup> More in detail, 'there is no formal dispute settlement mechanism which exists independently of the ordinary operation of the PRC Constitution, and [...] under the PRC Constitution, no national court is granted the independent power of applying and enforcing the Constitution or supervising the implementation of the HK and Macao Basic Laws, or resolving the legal conflicts between the SARs' autonomy and certain elements of the PRC legal system. Consequently, in contrast to other compound legal systems, the PRC has no supreme judicial organ to coordinate and to resolve conflict of laws issues among the independent courts of the SARs and the people's courts in the Mainland'. Liang, n, 228.

<sup>111</sup> See Article 14 of EAW FD, n 11.

<sup>112</sup> See Case C-168/13 PPU, Jeremy F. v Premier ministre [2013] ECR - General.

third one which is guaranteed by the Court of Strasbourg enforcing the European Convention on Human Rights.

The first level protection also exists in Hong Kong, the Court of committal will hear the case, and after the decision the requested person can launch an appeal before the Appeal court.<sup>113</sup> The requested person can also apply for habeas corpus, and in this case the final decision lies with the Chief Executive.<sup>114</sup> However, since there is no such judicial body enjoying the jurisdiction over Hong Kong and Mainland China, like European Court of Justice enjoys over all EU Member States, there cannot be another level of protection, beyond Hong Kong courts. Considering that Hong Kong and Mainland China belong to one country, the People's Republic of China, one could think of having a higher judicial body enjoying the common jurisdiction on the two regions. Though, introducing such a of judicial organization might be problematic, in light of the “two systems” principle, according to which Hong Kong has a separate legal system from Mainland China. In other terms, the judicial independence in Hong Kong should not be jeopardized.

### *Assurance required in the surrender procedure*

The FOO Amendment did not introduce specific binding rules as to whether specific safeguards can be asked from the requesting regions before authorizing surrender. The possibility to require and to receive assurance concerning, among others, respect of the presumption of innocence, publicity of trial, right to visit, right against the self-incrimination, and right to appeal, would have been only regulated by policy documents or customs, which are however not legally binding. Whether this kind of assurance could be granted is within the discretion of the requesting part.<sup>115</sup>

Moreover, the body entrusted with requesting these assurances would have been the Chief Executive,<sup>116</sup> which as mentioned - there is concern - might not be in a sufficiently political strong and independent position to ask these safeguards from mainland China authorities.<sup>117</sup>

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<sup>113</sup> Part 2, Section 11 of FOO, n 2.

<sup>114</sup> Part 2, Article 12, 13 of FOO, n 2.

<sup>115</sup> See Para. 11 of HK Bar Association Opinion, n 57.

<sup>116</sup> See Paragraph 2 of HK Bar Association Opinion, n 57.

<sup>117</sup> See paragraph 12 of HK Bar Association Opinion, n 57.

## Conclusion

This article has provided a brief analysis of the proposed amendment to the Fugitive Offender Ordinance - the Hong Kong domestic legislation regulating extradition from and to Hong Kong - the Hong Kong government proposed in 2019, so to allow surrender of fugitives to the rest of the PRC, and notably Mainland China. It has described the unique constitutional setting in which this arrangement was proposed, namely Hong Kong and Mainland China which are two regions of the same sovereign country, but where two different legal system apply, in observance to the "One Country, Two Systems" policy. The article has shown that, given the peculiar context, the proposed special surrender arrangement envisaged a surrender system which for certain aspects is less advanced, and present more obstacles to surrender than standard international extradition Treaties, and of the system in force regulating extradition between Hong Kong and third countries. This is the case for instance of the rules on penalty threshold and on double criminality. On other aspects the special arrangement appears even more advanced than the European Arrest Warrant, one of the most advanced systems of international surrender, as for instance what concerns the extradition of Hong Kong residents, which admittedly are for a large part citizens of PRC, but which enjoy a special status, entailing, among others, the possibility of being issued Hong Kong passports.

As mentioned, the protests that followed the proposal of the FOO amendment have led the Hong Kong authorities to withdraw the draft text. Moreover, the current tense situation which followed the adoption by the Standing Committee of the National People's Congress of the security law applying to the territory of Hong Kong make a new discussion of special arrangement for surrender between Hong Kong and Mainland China unlikely in the near future, and as highlighted, also puts the effective implementation of Hong Kong extradition Treaties with third countries at risk. In any case, should the political situation evolve, and a new draft be proposed, the text here analysed might constitute a blueprint on the basis of which future text will be based. The issues, highlighted above, chiefly the question of distrust towards the criminal justice system in Mainland China, nonetheless remain. In this context, one avenue to smoothen the surrender proceedings between Hong Kong and Mainland China, this article has suggested, would be the procedural one, namely envisaging a broader role for courts in the procedure, which, at least in principle, should be independent from the executive power in Hong Kong and therefore from executive power in mainland China, as opposed to the wide role granted in the proposed amendment of the FOO the Chief Executive in Hong Kong which is ultimately accountable to the Central People's Government .



